Cassis Management Corporation *and* Service Employees International Union, Local 32E, AFL–CIO. Case 2–CA–29311

April 14, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On September 30, 1996, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel and the Respondent filed exceptions, supporting briefs, and answering briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this decision.

We agree with the judge's findings that the Respondent discharged the entire bargaining unit, including employee Charles W. Morrow, in violation of Section 8(a)(3) and (1) of the Act, and that the unit employees named in the recommended Order should be offered reinstatement and be made whole for their losses. We do not agree, however, with the judge's findings that Donald Hoy is a supervisor within the meaning of Section 2(11) of the Act. Accordingly, we reverse the judge and find that Hoy was unlawfully discharged, that the union authorization cards solicited by Hoy were valid, that the Union demonstrated that a majority of the employees in the bargaining unit wished to be represented by the Union, and therefore, that there is a basis for a bargaining order under the principles enunciated in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

The Facts

The Respondent is owned and operated by the Cassis family. The Respondent owns and manages the 262 unit Mountainview Apartments. As of April 4, 1996,[2] the following individuals were employed at Mountainview: General Manager George Cassis; Property Manager Kathleen Shea (a stipulated supervisor); office clerical Carol McNiff; Superintendent Donald Hoy; handymen Joe Moody, Charles Morrow, and Dean Cassimitis (a family member and not part of the unit); and porters Charles Allien, Louis Cioffi, and Nicholas Michel.

In the second or third week of March, Hoy met with officials of the Union, obtained authorization cards, signed a card himself, and solicited the other employees to sign cards. Union Attorney Matthew Parsanis, by a letter dated March 26, requested recognition based on cards signed by a majority of the Respondent's six employees, namely, Hoy and employees Cioffi, Moody, and Morrow. The Union received no reply to its letter, and the Union filed a petition for a representation election on April 3.

The judge found that George Cassis received the Union's letter on or before April 4. On the afternoon of April 4, Kathleen Shea informed all the employees that they were discharged. Immediately thereafter, Charles Morrow telephoned George Cassis, who said that he had gotten a letter from the Union, that he did not want a union, and that the employees were all terminated. That same afternoon Hoy received a call from Shea while he was on vacation. Shea told Hoy that Cassis instructed her to fire the entire crew because they had gone to the Union.

A. *Hoy's Supervisory Status*

The judge found that Hoy was a statutory supervisor. The General Counsel has excepted, and we find merit in this exception. It is well settled that the burden of proving supervisory status is upon the party asserting it.[3] Thus, the burden was on the Respondent to establish Hoy's supervisory status. Contrary to the judge, we find that the Respondent has failed to meet that burden.

Hoy became employed by the Respondent through his mother, who was the property manager until her retirement in June 1994. She assigned him to be the superintendent in 1990. The porters mainly perform cleaning functions, and handymen or maintenance employees perform various types of repairs, although there is a degree of overlap in duties between these two classifications. When the type of repair requires the use of an outside contractor, George Cassis makes the decision to hire outside contractors.

When Hoy's mother retired, the Respondent hired Shea to be the property manager. Shea works in the office and supervises the secretary. She handles the collection of rents, screens applicants for apartments, acts as a liaison between the Respondent and its attorneys and tenants, receives and enters in the log book tenant requests for repairs, prepares the payroll, and, by her own admission, supervises unit employees.

Hoy lived in a rent-free apartment valued at $700 to $800 per month. His wages were $450 per week, the same as those of handyman Joe Moody, but less than those received by family member Dean Cassimitis. Hoy was scheduled to work from 8 a.m. to 4 p.m.,

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] All dates are in 1996 unless otherwise indicated.

[3] *Chevron U.S.A., Inc.*, 309 NLRB 59, 62 (1992), enfd. mem. 28 F.3d 107 (9th Cir. 1994); and *George C. Foss Co. v. NLRB*, 752 F.2d 1407, 1410 (9th Cir. 1985).

Monday through Friday, but was on call 24 hours a day. Hoy reported to Shea and George Cassis. Hoy performed boiler maintenance and landscaping, as well as maintenance and repair work on buildings and apartments.

George Cassis came to the property once or twice a week and met with Shea and Hoy. They discussed matters such as equipment needs, new repairs, the need for outside contractors, and the expenditure of money. Hoy asked for direction on how to handle particular problems, and Cassis gave Hoy specific directions. When something special arose, Cassis called Hoy at home.

Shea informed Hoy of tenant complaints and repairs that needed to be made. Hoy and the other unit employees met with Shea daily in the office at 8 a.m. and discussed the work that needed to be done. Additionally, employees looked at the log book to determine the next project to be performed.

Like Shea, Hoy interviewed job applicants and eliminated those he deemed to be unqualified. Significantly, George Cassis conducted his own interviews with the qualified candidates before making a hiring decision.

In his decision, the judge repeatedly expressed doubt concerning his conclusion that Hoy was a supervisor. For example, the judge stated that "[a]s Hoy's relationship to the company was one which evolved over time and was not reduced to any writing, the evidence regarding his supervisory status is, at least to my mind, ambiguous." The judge's decision is, at best, equivocal regarding his findings as to Hoy's authority to effectively discharge, hire, or reward employees.[4] The judge acknowledged that Hoy "lacked many of the criteria for supervisory status." Nevertheless, the judge found that Hoy "assigned and directed the work" of unit employees, including nonroutine work, in a manner requiring the exercise of independent judgment, and he found Hoy to be a supervisor on that basis.

We agree with the General Counsel that Hoy possessed no primary indicia of supervisory status, including the authority to assign and direct the employees in a manner requiring the exercise of independent judgment.[5] The Board has observed that, in enacting Sec-

[4] We find that the Respondent has not sustained its burden of demonstrating that Hoy had the authority to discharge, hire, or reward unit employees, or effectively to recommend such action. Concerning Hoy's discharge recommendations, the judge found that "his recommendations had mixed results." Although Hoy successfully recommended the discharge of Shawn Bunch, the Respondent ignored Hoy's repeated recommendations that Moody be terminated for absenteeism. There is no evidence that Moody was even disciplined for his absenteeism. Hoy continually recommended that Carlos Reyes be terminated. The judge found that Cassis finally "acceded" to this request. We do not adopt this finding, however, because Reyes, Cassis, and Hoy all testified that Reyes was never discharged. When the record evidence is considered as a whole, we find that the Respondent has failed to show that Hoy's discharge recommendations were generally followed.

Concerning Hoy's role in the hiring process, his screening of applicants to eliminate individuals lacking the necessary qualifications is clearly not sufficient to establish 2(11) supervisory status. See *The Door*, 297 NLRB 601, 602 (1990). With the exception of one isolated instance in which Cassis agreed with Hoy's recommendation to "try out" Shawn Bunch, the son of a tenant, the record shows that Hoy's hiring recommendations were independently evaluated by George Cassis. Thus, as stated above, it was Cassis' practice to personally interview job applicants before deciding to hire them.

The Respondent contends, and the judge found, that Hoy successfully recommended that Moody be given a raise. We agree with the General Counsel that the evidence concerning this matter does not support a finding of supervisory status. The record reveals that Hoy merely asked Cassis to restore to Moody an $80 cut in take home pay lost because of an accounting change. The recommendation was not followed with respect to the amount. Even assuming this incident constituted an effective recommendation for a pay raise, it was the only such instance in Hoy's 6 years of employment. We find that it represents far too isolated an occurrence to constitute evidence of meaningful supervisory authority.

No specific evidence was presented that Hoy ever evaluated, transferred, promoted, laid off, recalled, disciplined, or suspended employees or adjusted their grievances.

[5] The judge based his conclusion on two additional factors, namely that Hoy was "the highest paid of the maintenance employees," and that Hoy was the only person "who could supervise the employees on a day-to-day basis." We agree with the General Counsel that the judge's latter two findings relate to secondary indicia of supervisory status. It is well settled that secondary indicia of supervisory authority are in themselves not controlling. *Consolidated Services*, 321 NLRB 845, 846 fn. 7 (1996). Furthermore, we find the judge's findings regarding these matters to be inaccurate. The judge incorrectly found that Hoy was the highest paid of all the maintenance employees. The value of his apartment translates to $175 to $200 per week. This amount plus Hoy's salary is still less than Cassimitis' salary. Presumably, the free apartment was a benefit Hoy received in return for being on call 24 hours a day.

The judge found that Hoy was the only person able to supervise the employees at the complex "on a day-to-day basis." In so finding, the judge discounted the daily presence of admitted Supervisor Shea and the regular visits of George Cassis and of George's mother and the Respondent's general partner, Carol Cassis. As noted, Shea was present daily on the property and admitted she "supervise[d] the men—staff" at the complex. Her admission is consistent with Hoy's description of Shea as his "boss" and is not diminished by her protestation that she lacked the technical experience in building maintenance. Furthermore, she testified that she accompanied Cassis on his inspections of the complex, during which they examined "things in need of repair." She further testified that during her daily conversations with Cassis, she discussed "things in need of repair or what was being done on it." Hoy testified that he discussed work to be done with Shea on a daily basis.

Concerning the visits of George Cassis, the record reveals that he was intimately involved in supervising the work at the facility. He conducted inspections of the property, noted the quality of employees' work, examined things in need of repair, discussed repairs with Shea, discussed with Hoy the manner in which repairs were carried out, authorized equipment purchases, hired contractors, and handled "whatever has to be taken care of" at the complex. With respect to Carol Cassis, the record shows that on one of her monthly visits to the property, she held a meeting with Hoy to discuss the security of his job and then conducted a job interview with applicant Charles Morrow.

In sum, given the presence of Supervisor Shea at the apartment complex, the regular visits of General Manager George Cassis, and general partner, Carol Cassis, and the fact that Hoy was able to communicate with George Cassis by telephone, we conclude that the

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tion 2(11), Congress stressed that only persons with "genuine management prerogatives" should be considered supervisors, as opposed to "straw bosses, leadmen . . . and other minor supervisory employees." *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985). Therefore, the Board has a duty to employees "not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied . . . rights which the Act is intended to protect." Id. at 1689. Additionally, the Board has often held that building superintendents were nonsupervisory employees.[6]

The judge conceded that the work performed by the porters was "repetitive or routine" and involved mainly cleaning. The judge found that "the same could not be said for the maintenance work which sometimes involved repairs and upkeep to the buildings, garage, and apartments." He further concluded that the maintenance work might require electrical work or light plumbing, and that such functions "can hardly be called routine." We find, however, that the Respondent has not presented sufficient evidence to support the judge's conclusion that these duties are not routine. To the contrary, Shea acknowledged that the handymen performed the same kinds of routine minor repairs over and over again. The record reveals that nonroutine repairs requiring specialized expertise, such as bricklaying, plumbing involving pipe more than 2 inches in diameter, heating, and tree and glass work, were consistently performed by outside contractors.

The judge found that, during the morning meetings, Hoy "reviewed the work that needed to be done and gave out assignments." We find that the judge has mischaracterized the purpose of these meetings. According to Hoy's testimony, which was corroborated by Cioffi and Moody, the purpose of the meeting was for Hoy, who lived at the complex, to inform his coworkers if something had occurred during the night that they were required to deal with before they returned to their normal routine. The record is clear that the porters knew what to do regarding cleaning, that the handymen obtained their work assignments by referring to the tenant complaint book, and that no independent judgment was required to determine what problems constituted emergencies. We conclude that Hoy's announcements of emergency repairs cannot be considered evidence of supervisory authority.

Shea admitted that the handymen knew how to perform their repair work and did not require any further direction once they were notified of a tenant's complaint. There is no evidence that Hoy directed the employees in the performance of their work or evaluated their skills. Rather, Hoy testified that he only casually observed the work of other employees "in the process of performing [his] own duties."

We find that Hoy was an experienced senior employee subject to regular higher supervision. His limited role in the parceling out of tasks to the other employees is attributable to Hoy's status as the most senior employee and the fact that he lived on the premises. Accordingly, we conclude that Hoy did not assign and direct the unit employees in a manner requiring the use of independent judgment, nor did he possess any other indicia of supervisory status within the meaning of Section 2(11).

We further find that Hoy was not an agent of the Respondent. There is no evidence that Hoy was so closely associated with management in such a manner that the employees might assume that he was speaking for management on union matters.[7] On the contrary, it was clear that he openly expressed to fellow employees his disagreement with management's benefit and other personnel policies. Neither did Hoy enjoy any special employment privileges because of the position that formerly had been held by his mother. Therefore, we do not adopt the judge's finding set forth at footnote 8 of his decision that Hoy was an agent of the Respondent.

B. *Hoy's Unlawful Discharge*

The judge found, and we agree, that the bargaining unit employees (other than Hoy) were discharged because of their union activity. In doing so, the judge properly rejected the Respondent's asserted reasons for each of the discharges. The judge credited Hoy's testimony that Shea informed Hoy that he was being discharged because he and the other employees went to the Union. We have found that Hoy was a unit employee. Therefore, we conclude that Hoy was unlawfully discharged in violation of Section 8(a)(3), along with the other unit employees. Accordingly, we shall order that Hoy be offered reinstatement and given backpay and other remedies along with the other unit employees.

C. *The Bargaining Order*

Because we have found that Hoy was not a supervisor, we reverse the judge's finding that the authorization cards solicited by him were tainted. We find that the cards are valid and demonstrate that at the time of the Union's demand for recognition a majority of the

record does not support the judge's finding that Hoy was the only individual able to supervise the unit employees on a daily basis. See *First Western Building Services*, 309 NLRB 591, 603 (1992), and cases cited there.

[6] *Hagar Management Corp.*, 313 NLRB 438 (1993); *J.R.R. Realty Co.*, 273 NLRB 1523 (1985), enfd. 785 F.2d 46 (2d Cir. 1986); and *Elias Mallouk Realty Corp.*, 265 NLRB 1225 (1982). We do not agree with the judge's finding that these cases are distinguishable.

[7] By contrast, in the case cited by the judge in fn. 8 of his decision, there was testimony supporting the conclusion that the employees tended to regard the superintendents as closely identified with management.

employees—four of the six members of the unit—wished to be represented by the Union.[8]

In determining whether a bargaining order is warranted to remedy the Respondent's unfair labor practices, we apply the test set forth in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). There the Court identified two categories of cases in which a bargaining order would be appropriate absent an election. The first category of cases involves "exceptional cases" marked by unfair labor practices that are so "outrageous" and "pervasive" that traditional remedies cannot erase their coercive effects, thus rendering a fair election impossible. The second category involves "less extraordinary cases marked by less pervasive practices which nonetheless have a tendency to undermine majority strength and impede election processes." In this second category of cases, the Court reasoned that the "possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight and that employee sentiment once expressed [by] cards would, on balance, be better protected by a bargaining order." Id. at 613, 614–615; *Massachusetts Coastal Seafoods*, 293 NLRB 496, 498 (1989).

In this case, the Respondent discharged the entire bargaining unit immediately after it learned that the Union requested recognition. Additionally, the Respondent made it clear to employees that the reason for the discharges was the unit employees' support for the Union.

Discharge of an entire bargaining unit is the ultimate retaliation for union activity, the final assault on the employment relationship. It is difficult to conceive of unfair labor practices with more severe consequences for employees or with more lasting effects on the exercise of Section 7 rights. Mass discharges leave no doubt as to the response that the employees will reasonably fear from their employer if, after reinstatement, they persist in their support for a union. Even newly hired employees Allien and Michel were not exempt from the Respondent's unlawful "power display" against the work force. See *Majestic Molded Products v. NLRB*, 330 F.2d 603, 606 (2d Cir. 1964). The coercive impact of the Respondent's discharge of the entire unit is increased by virtue of the precipitate and reflexive nature of the discharges here, carried out immediately after the Union requested recognition.[9] Thus, the discharges served abrupt, graphic, and indelible notice on the employees that the Respondent controlled their employment, to the exclusion of any outside agency that might seek an improvement in their conditions. The impact of these discharges is further heightened by the special stature and direct involvement of George Cassis, who is an owner of the Respondent and the son of Carol Cassis, who holds the largest partnership share of the Respondent.

It can hardly be gainsaid that the Respondent's discharge of the entire bargaining unit, in conjunction with the Respondent's contemporaneous statement to employees that the reason for the mass discharge is their union activity, constitutes unfair labor practices that are both outrageous and pervasive. Therefore, we find that the Respondent's conduct places it in the realm of those exceptional cases warranting a bargaining order under category I of the *Gissel* standard, such that traditional remedies cannot erase the coercive effects of the conduct, making the holding of a fair election impossible.[10]

Additional support for the bargaining order is provided by *Balsam Village Management Co.*, 273 NLRB 420 (1984), enfd. 792 F.2d 29 (2d Cir. 1986). In that case, the Board found that a *Gissel* bargaining order was necessary to remedy what it described as the employer's "unlawful discharge of an entire bargaining unit, lock, stock and barrel, for the express purpose of avoiding the statutory bargaining obligation." The court of appeals upheld the Board's decision, finding that "[a]ll of the requirements for enforcement of a *Gissel* order have been met here." 792 F.2d at 33.

Furthermore, even assuming arguendo that the Respondent's conduct does not fall within *Gissel* category I, the unfair labor practices certainly qualify as "less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process." *Gissel Packing*, supra at 614. Thus, the discharge of union adherents has long been considered by the courts to be a "hallmark" violation of the Act because of its lasting effect on election conditions. *NLRB v. Jamaica Towing*, 632 F.2d 208, 212–213 (2d Cir. 1980). This unlawful conduct, which "goes to the very heart of the Act," *NLRB v. Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941), directly affected every member of the bargaining unit.

[8] The Respondent has questioned the validity of Moody's card because he did not sign it. The record shows that Moody filled out an authorization card, but neglected to sign it. Moody did, however, sign and date a form attached to the card, titled "Application for Membership." Moody also paid for and received a union "Membership Book" dated March 25, 1996. Further, when his failure to sign his authorization card was brought to his attention by Hoy, Moody approved the signing of the card by union delegate Davis. In these circumstances, we find that the authorization card in question clearly demonstrates Moody's desire to be represented by the Union.

In view of our determination that Hoy is not a supervisor, we find it unnecessary to pass on the General Counsel's contention that, even if he is a supervisor, the cards he solicited should be counted.

[9] *Astro Printing Services*, 300 NLRB 1028 (1990).

[10] In a category I case like this one, the District of Columbia Circuit has held that the Board "need not make detailed findings of the type required for Category II cases, but instead must only make 'minimal findings' of the lasting effect of unfair labor practices to support a bargaining order." *Power Inc. v. NLRB*, 40 F.3d 409, 422 (1994). Consistent with the court's decision, we have set forth above our reasons for finding that the detrimental effects of the unfair labor practices will persist over time.

The Board has found that such hallmark violations committed by high company officials in a small unit have a tendency to undermine majority strength and impede the election process. *Airtex*, 308 NLRB 1135 (1992). While it is true that the discharged unit employees are entitled to reinstatement and backpay, these remedies would not, in our view, erase the coercive effect of the Respondent's conduct. The reinstated employees would not likely risk the recurrence of a long period of unemployment by engaging in further attempts to improve their working conditions, in the absence of a bargaining order. And given the swiftness and thoroughness with which the Respondent reacted to the first sign of the Union's presence, the likelihood of it again resorting to illegal conduct is clearly present.[11]

In these circumstances, we conclude that the possibility of erasing the effects of the Respondent's unfair labor practices by traditional remedies and the conducting of a fair election is slight. We further find that the employee's representational desires as expressed by authorization cards would, on balance, be better protected by a bargaining order and that, therefore, a bargaining order is also warranted under category II of the *Gissel* standard.

Accordingly, we conclude that a bargaining order is presumptively appropriate in the circumstances of this case.[12] We shall not, however, order the Respondent to bargain with the Union at this time, because of the need to resolve the alleged picket line misconduct issue discussed below.

D. *The Alleged Picket Line Misconduct*

Concerning whether or not the Board should issue a bargaining order, the Respondent in its exceptions contends that certain picket line misconduct must preclude any such order under the doctrine set forth by the Board in *Laura Modes Co.*, 144 NLRB 1592 (1963). At the hearing, the Respondent presented testimony from two newly hired employees who crossed the picket line, at least one of whom was a union member, that a union official stated that he wanted to kill them. The Union presented several witnesses who denied that any such comments were made by anyone on the picket line and represented that the individuals who picketed remained off of the Respondent's property and conducted themselves at all times in a proper and orderly manner.

Because the judge's finding regarding the supervisory status of Hoy led him to conclude that there was no basis for a bargaining order, the judge did not set forth this conflicting testimony or make a credibility resolution concerning it. In light of our conclusion that a bargaining order is presumptively appropriate, we find it necessary to remand this proceeding to the judge for a resolution of this conflict in the testimony and for an analysis of the Respondent's *Laura Modes* defense.[13]

Accordingly, we shall remand this proceeding to the judge for the purpose of making resolutions of credibility concerning the testimony regarding the alleged picket line misconduct by a representative of the Union, and findings of fact and conclusions of law concerning this evidence.[14]

ORDER

The National Labor Relations Board orders that the Respondent, Cassis Management Corporation, Dobbs Ferry, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting Service Employees International Union, Local 32E, AFL–CIO (the Union), or any other union.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Charles Allien, Louis Cioffi, Donald Hoy, Nicholas Michel, Joe Elias Moody Jr., and Charles W. Morrow, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Charles Allien, Louis Cioffi, Donald Hoy, Nicholas Michel, Joe Elias Moody Jr., and Charles W. Morrow whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Charles Allien, Louis Cioffi, Donald Hoy, Nicholas Michel, Joe Elias Moody Jr., and Charles W. Morrow, and within 3 days thereafter notify them in

[11] The Respondent acted so precipitously that the Union never had sufficient time to utilize the Board's election machinery. (The discharges occurred just 1 day after the Union's election petition was filed.) In light of this track record, it is doubtful at best whether the Respondent would ever permit a fair election to be held.

[12] In light of the Respondent's egregious and widespread misconduct demonstrating a general disregard for the employees' fundamental statutory rights, we find that a broad cease-and-desist order is warranted under *Hickmott Foods*, 242 NLRB 1357 (1979).

[13] We find no basis in the record for the Respondent's suggestion in its brief in support of its exceptions that the Union's picketing was conducted improperly in any other respect.

[14] Because this case involves a petition for relief pursuant to Sec. 10(j) of the Act, we ask the judge to issue his findings as expeditiously as possible.

writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at is Dobbs Ferry, New York facility copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 11, 1996.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that this proceeding is remanded to Administrative Law Judge Raymond P. Green for the purpose of making credibility resolutions concerning the testimony regarding alleged picket line misconduct, findings of fact, conclusions of law, and recommendations concerning the alleged picket line misconduct and its effect on the appropriateness of a bargaining order.

IT IS ALSO FURTHER ORDERED that the judge prepare and serve on the parties a supplemental decision containing credibility resolutions, findings of fact, conclusions of law, and recommendations. Following service of the supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

MEMBER HIGGINS, dissenting.

I agree with Administrative Law Judge Raymond P. Green's finding that Donald Hoy is a supervisor. Accordingly, I dissent from the contrary conclusion of my colleagues.

Hoy was the Respondent's superintendent. As such, he assigned and directed the work of unit employees. The judge found that, except for the cleaning work, the work performed by unit employees was not routine. More particularly, the repair and upkeep of the buildings, garage, and apartments involved electrical and light plumbing functions. Both the selection of particular employees for specific tasks, as well as the direction of these employees, required the use of independent judgment, according to the judge. I would not disturb these findings.[1]

Since Hoy was a supervisor, the cards that he solicited were not valid, and they, therefore, cannot be used to support a bargaining order.

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] My colleagues assert that the tenant complaint book would set forth the work to be performed. However, this book did not set forth which particular employees would be assigned specific tasks.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any employee for supporting Service Employees International Union, Local 32E, AFL–CIO, or any other union.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Charles Allien, Louis Cioffi, Donald Hoy, Nicholas Michel, Joe Elias Moody Jr., and Charles W. Morrow, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Charles Allien, Louis Cioffi, Donald Hoy, Nicholas Michel, Joe Elias Moody Jr., and Charles W. Morrow whole for any loss of earnings and

other benefits suffered as a result of the discrimination against them, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Charles Allien, Louis Cioffi, Donald Hoy, Nicholas Michel, Joe Elias Moody Jr., and Charles W. Morrow and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

CASSIS MANAGEMENT CORPORATION

Ian Penny and *Lauri Kaplan Esqs.*, for the General Counsel.
Robert Ziskin and *Stacey Ziskin, Esqs.*, for the Respondent.
Mathew N. Persanis, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in New York, New York, on July 22–24, and 31 and August 1, 1996. The charge and first amended charge were filed on April 11 and 16, 1996. On May 30, 1996, a complaint was issued which, as amended at the hearing, alleged in substance:

1. That from March 22 to 25, 1996, a majority of employees in an appropriate unit, designated the Union as their representative.

2. That on or about March 27, 1996, the Union requested recognition in a unit consisting of:

> All full-time and regular part-time cleaning, painting, and maintenance workers employed by the Employer at its facility located at 200 Beacon Hill Road, Dobbs Ferry, New York, excluding all managers and supervisors as defined in the Act.

3. That on or about April 4, 1996, the Respondent discharged all of its unit employees; to wit, Donald Hoy, Charles W. Morrow, Louis Cioffi, Joe Elias Moody Jr., Charles Allien, and Nicholas Michel.

4. That the aforesaid conduct made a fair election improbable and therefore that a bargaining order should be issued.

FINDINGS OF FACT

I. JURISDICTION

The Company owns and manages various properties, including the Mountainview Apartments in Dobbs Ferry, New York. At the hearing, the Company amended its answer to admit and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES[1]

A. *The Status of Donald Hoy*

The Respondent consists of the Cassis family. The two founders and general partners are Constantine and his wife, Carol Cassis. Their children, George, Nicholas, Emanuel, and Elaine Cassis, are limited partners. The children have a variety of functions but are subordinate to the parents in terms of the Company's management. This enterprise owns various properties including an apartment complex called the Mountainview Apartments, which is located on a 15-acre tract of land in Dobbs Ferry, New York. The Respondent's main office and place of business is Freeport, New York, which is at least an hour's drive from the Dobbs Ferry complex.

George Cassis is the family member who is responsible for, among other things, running the Mountainview Apartment complex which is a group of 262 garden apartments in 14 buildings. In this regard, in addition to visiting other properties, he visits this site about one or two times per week and consults with either Donald Hoy, the superintendent, or Kathy Shea, the office manager. (The complaint alleged and the Respondent stipulated that Shea was a supervisor within the meaning of Sec. 2(11) of the Act.) George Cassis' son also works at this complex as a maintenance person. George Cassis' mother has no operational functions with respect to this apartment complex; although as we shall see further on, she did make one decision that was important in this case.

I should note that this is a small company which does not have a highly defined hierarchy. As Hoy's relationship to the Company was one which evolved overtime and was not reduced to any writing, the evidence regarding his supervisory status is, at least to my mind, ambiguous.

Hoy became employed through his mother who was the property manager until her retirement in June 1994. After a period of time, she assigned him to be the superintendent and it appears that she pretty much defined his role at the apartment complex. In the past, there have been anywhere from between three to six other maintenance employees working at the complex at any given time. These consist of porters who mainly do cleaning functions and maintenance people who do various types of repairs except where the extent or type of repair may require the use of an outside contractor.[2] There is, however, a degree of overlap and when it snowed profusely during 1995, all the employees were involved in snow removal.

When Hoy's mother retired, the Respondent hired Kathy Shea to be the property manager. She essentially works in the office with a secretary and handles the collection of rents, screens people who apply for apartments, acts as a liaison between the Company, its attorneys and tenants, receives and enters tenant requests for repairs, does payroll, and supervises staff. As noted above, it was stipulated that Shea was a supervisor within the meaning of Section 2(11) of the Act. Contrary to the General Counsel's assertion that Hoy reported to Shea, he testified that he considered himself to be on the same level as Shea. It is noted that Shea testified that she has no knowledge of repairs and maintenance and there-

[1] This Company was found to have violated the Act in an earlier case called *Cassis Management Corp.*, 281 NLRB 1304 (1986). In that case, which involved an apartment building in Freeport, New York, the Respondent was held to have violated Sec. 8(a)(1) by unlawfully interrogating an employee, and to have violated Sec. 8(a)(3) of the Act by discharging an employee because he signed an authorization card for Local 32B-32J.

[2] When a repair may require the use of an outside contractor, this is a matter which is discussed between George Cassis and Donald Hoy. Cassis, obviously is the person who ultimately makes the decision as to whether to use a contractor.

fore she cannot and does not give instructions to the maintenance employees on these subjects.

The evidence shows that Hoy earned $450 per week and received the free use of an apartment that was worth between $700 and $800 per month. Thus, his total weekly remuneration was about $625 to $650 per week. This was more than any of the other porters and maintenance people working at the facility. In addition, he had the use of a company vehicle.

Every morning Hoy held a meeting with the employees where he reviewed the work that needed to be done and gave out assignments. Hoy testified that his job was to see that the employees were doing their jobs correctly and that if they had problems they would talk to him about them. He also testified that employees would call him if they could not come in to work. While it may be said that the porter functions were repetitive or routine and mostly involved cleaning, the same cannot be said for maintenance work which sometimes involved repairs and upkeep to the buildings, garage, and apartments. Thus, the maintenance people might on some occasions be called upon to do electrical work while at other times be required to do light plumbing. These functions, which can hardly be called routine, were overseen by Hoy.[3]

By the spring of 1996, there was quite a lot of repair and maintenance work that had to be done. And because of the extensive snow storms, which not only took time away from repairs but created damage to the structures, the backlog of repairs was quite extensive.

Hoy admittedly interviewed job applicants and he could eliminate from consideration, those people whose resumes or prior experience he felt were not adequate for a position. Along with Shea, he made hiring recommendations to George Cassis, but it is fairly clear that his recommendations have not always been followed.[4] Thus, in January 1996, Hoy recommended to Cassis that Morrow be hired, but someone else was hired instead. (Morrow was subsequently hired in April 1996 but Hoy did not play any role in that decision.) On the other hand, Hoy and his mother interviewed and recommended the hiring of Joe Moody in 1990. (Hoy, on one occasion, also successfully recommended that Moody receive a pay increase.) And Hoy recommended the hiring and subsequent discharge of Shawn Bunch in early 1996. (Bunch worked briefly as a porter.)

The Respondent put in evidence to show that Hoy could commit the Company's credit for purchases for supplies and tools. However, the evidence shows that other employees such as Joe Moody could do the same and, therefore, this assertion by the Respondent does not have much weight.

There also was evidence that Hoy, on various occasions, recommended to Cassis that individuals be discharged. In this respect, his recommendations had mixed results. For example, Hoy testified that he had unsuccessfully recommended that Moody be discharged on several occasions on account of his absenteeism. On the other hand, Hoy successfully recommended the discharge of Bunch. Moreover, the evidence shows that Hoy kept asking for the discharge of Carlos Reyes (a porter) until George Cassis acceded and discharged the man.

While not free from doubt, the evidence as a whole leads me to conclude that Hoy was a supervisor within the meaning of Section 2(11) of the Act.[5]

The Board and the courts have interpreted Section 2(11) of the Act in the disjunctive so that the possession of any one of the authorities listed in this section of the Act places a person into the supervisory class. *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), cert. denied 338 U.S. 899. See also *NLRB v. Porta Systems Corp.*, 625 F.2d 399, 401 (2d Cir. 1980); *Allen Services Co.*, 314 NLRB 1060 (1994); and *Queen Mary*, 317 NLRB 1303 (1995). Nevertheless, the Board has made it plain that the party asserting that a person is a supervisor has the burden on that issue. *Adeo Electric*, 307 NLRB 1113 fn. 3 (1992).

While Hoy lacked many of the criteria for supervisory status, the evidence shows that he assigned and directed the work of between three and six individuals; that he oversaw their work and gave them direction; that at least some of this work, involving repair and maintenance, was not routine; and that in doing so he exercised independent judgment. See *Superior Bakery*, 294 NLRB 256 (1989); *Rose Metal Products*, 289 NLRB 1153 (1988); *Illini Steel Fabricators*, 197 NLRB 303 (1972); and *Custom Bronze & Aluminum Corp.*, 197 NLRB 397 (1972).

The evidence shows that Hoy was the highest paid of the maintenance employees. Moreover, as Shea did not have the knowledge to supervise repair and maintenance work, and as George Cassis visited about two times a week, the only person at the facility who could supervise the employees on a day-to-day basis was Hoy.

The General Counsel cites a number of cases where building superintendents were held to be nonsupervisory employees.

In *J.R.R. Realty Co.*, 273 NLRB 1523 (1985), the administrative law judge (ALJ) concluded that the person in dispute was not a supervisor, but was more in the nature of "an experienced, senior employee who routinely oversees the maintenance of the building, and is subject to regular and constant higher supervisor." The judge noted that higher management visited the jobsite at least once a week to inspect what was going on. He noted that there were only two other employees (the elevator operator and porter) who had jobs that were repetitive in nature and which required no particular further instructions or assignments. The Board noted that although the individual in question testified that he "hired" the porter, and that the authority to hire is often a dispositive factor for supervisory status, that if the "hiring" individual merely performed a ministerial act or hired at the direction of another, this would not, by itself, prove supervisory status.

[3] Louis Cioffi, one of the alleged discriminatees, testified that he was employed as a landscaper and general worker whose job included painting, cleaning hallways, and keeping the grounds maintained. He testified that he would follow a routine unless Hoy assigned him to some other job that needed doing.

[4] Hoy acknowledges that for some time before his discharge and his union activity his relationship with George Cassis was strained. This could account for the fact that his recommendations were not always followed.

[5] Sec. 2(11) of the Act defines as supervisor as follows:

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In *Hagar Management Corp.*, 313 NLRB 428 (1993), the Respondent was charged, inter alia, with being a successor and not recognizing the union that had been party to a contract with the predecessor company. That contract covered two people employed at the building; the superintendent and the porter. The ALJ concluded that the superintendent was not a supervisor (and therefore illegally discharged), noting his testimony that he had none of the authority listed in Section 2(11) of the Act, that he merely passed along complaints about dirt to the porter, and that if tenants requested repairs, he would have to obtain permission to make the repair from the management office. The ALJ also found that since the purchase of the building, the new company sent a supervisor to the building several times a week.

In *Elias Malluk Realty Corp.*, 265 NLRB 1225 (1982), the employer was found to have illegally withdrawn recognition from one union, while entering into a contact with a rival union. The ALJ found that the superintendents (who had been represented under the old contract with Local 32B-32J), did not exercise supervisory authority. In this regard, he held that their hire and discharge recommendations were independently evaluated by higher management who did not uniformly or even generally follow their recommendations. The ALJ concluded that the superintendents were more like experienced, senior employees who "routinely supervise the maintenance of their buildings, but subject to regular and constant higher supervision, report and even recommend on personnel actions regarding the assistants under them, but do not exercise independent judgment on personnel matters and are not uniformly or even generally followed on thier personnel recommendations when made or solicited."

Notwithstanding the conclusion that the superintendents in *Elias Malluk Realty Corp.*, were not supervisors, the ALJ nevertheless found that they were agents of the respondent for purposes of its liability pursuant to Section 8(a)(1) and (2) of the Act. (For the threat by one and the assistance conduct of the other.) He noted that the employees tended to regard the superintendents as closely identified with management and that the employees could reasonably believe that the superintendents spoke and acted for management, particularly on union-related matters.

Notwithstanding the cases cited above (and the other cases cited by the General Counsel in his brief), I think that the facts of the present case are distinguishable and put Hoy over the line into supervisory status.

B. *The Status of Charles Morrow*

The Respondent asserts that Morrow was retained as an independent contractor. I reject this contention and find that he was hired as an employee.

Prior to his association with the Respondent, Morrow was a self-employed contractor. (He and Hoy knew each other through the school that their children attended.) In response to a newspaper advertisement, he spoke to Kathy Shea in January 1996 and was also interviewed by George Cassis. At that time, he was engaged to do a single tiling job lasting about 3 hours for which he was paid $75. Upon finishing that one job, he was not called back by the Respondent until March 1996.

In mid-March 1996, Morrow spoke with Hoy and was told that the Company needed someone. According to Morrow, he had an interview with George Cassis, Emanuel Cassis, and Carol Cassis on March 20, 1996. Morrow states that he explained what he could do and what his fees were but stated that he wanted to be hired as an employee rather than as a contractor. And in this regard, Morrow states that there was a discussion about whether to hire him as an employee or an independent contractor and that he was told that they wanted to think it over. Finally, Morrow testified that he was asked if he was in any union and if he would sign a contract stating that he would not join a union. Nothing was settled during this meeting and the Employer's representatives said that they would contact Morrow.

According to Morrow, he received a phone call from George Cassis on the evening of March 20 and was told that the family had talked it over and that he was hired to begin on April 1 at $500 net pay per week.

Morrow testified that on March 27, 1996, he filled out an application form given to him by Shea and that he was told to report to work immediately. He states that he also filled out a tax withholding form and that Shea, after looking at a chart, figured out that he would have to have gross weekly earnings of between $696 and $704 to reach a net weekly pay of $500. At the same time, Morrow states that he spoke to Shea and George Cassis who set up his work schedule as being from Monday through Friday from 8 a.m. to 4 p.m. with the commitment that he would also be available for emergencies. He testified that no one said that this was going to be a temporary job or that he was being retained as an independent contractor. He also was told that Hoy was about to go on vacation.

On March 28, Morrow was shown around the property by Hoy who told him what his daily duties would be. Hoy also took him over to Readers Hardware to introduce him there so that he could make purchases on behalf of the Respondent. In addition, Kathy Shea gave him a copy of a list of backlogged repairs that needed to be taken care of. Morrow began working on this day and Hoy went on vacation on the following day.

George Cassis testified that when he offered the position to Morrow, he explicitly made the offer based on the understanding that Morrow would be working as an independent contractor. Nevertheless, whatever words were used at the time of the offer (and I will credit Morrow's version), the determination of whether a person is an employee or independent contractor is not dependent on the title used but on the actual relationship between the individual and the Company. *National Freight, Inc.*, 153 NLRB 1536 (1965).

The test of whether an individual is an independent contractor or an employee is the common law of agency right-to-control test. *NLRB v. United Insurance Co.*, 390 U.S. 254, 256 (1968). Pursuant to that test, an employer-employee relationship exists when the employer reserves the right to control not only the ends to be achieved, but also the means to be used to achieve those ends. On the other hand, where the control is reserved only as to the result, an independent contractor relationship exists. *Gold Medal Baking Co.*, 199 NLRB 895 (1972). See also *Standard Oil Co.*, 230 NLRB 967, 968 (1987).

In the present case, the evidence indicates that Morrow was hired to work for an indefinite duration, on a regularly scheduled 8-hour day, and to perform work assigned to him daily by the Respondent on its premises. He was to use the tools and equipment of the Respondent and was, during his

scheduled hours, to work exclusively for the Respondent. That the Respondent may have chosen to call him an independent contractor is of no legal consequence, since it is clear to me that the Respondent intended to retain the right to control not only the ends to be achieved but also the means to be used to achieve those ends.

C. *The Discharges*

In the second or third week of March 1996, Hoy met with representatives of the Union and talked to them about the possibility of having union representation. On or about March 22, 1996, he went to the Union's office where he obtained union authorization cards which he thereafter distributed to employees.

Hoy signed a union card on March 22, 1996, and he was the person who solicited the others to sign the cards. Cioffi and Morrow signed union cards on March 25. Moody, although not signing a card himself, testified that he authorized a union representative to sign a card on his behalf, after Hoy told him that he had forgotten to sign the card that Hoy had given him.

Contemporaneous with the above, Hoy and Cassis got into a big argument over a matter unrelated to the Union. Cassis placed this argument as taking place on or about March 21 whereas Hoy placed it on or about March 27. In either event, the argument took place before the Company was aware of the Union and both sides agree that it was very heated.[6] According to Hoy, George Cassis accused him of ruining his relationship with his family. At one point during the argument, Cassis told Hoy to "get the f—k out," and states that he intended, by those words to discharge Hoy. He acknowledges, however, that he did not use the words, discharge or fire.

According to Hoy, after the argument Shea told him, later in the day that she had talked to George's mother (Carol Cassis), who told her that Hoy was not fired and that although George was her son, she was still the boss.[7] He also testified that a day or two later, he met with Carol Cassis who confirmed that his job was still secure. In this regard, C. Cassis testified that she went to the property on March 26, 1996, and that she had a conversation with Hoy on that date. Both Cassis and her other son, Emanuel, testified that during the conversation she asked if Hoy was coming back to work after his vacation and that when he said yes she told him that his job would still be there. It, therefore, is clear that despite the blowup between George Cassis and Donald Hoy, the latter was still employed by the Respondent when he left for his vacation on April 1, 1996.

Union Attorney Mathew Parsanis, wrote a letter to the Company, which was dated March 26, 1996, and signed by the Union's president, Robert L. Chartier. The letter was addressed to Cassis Management, at 100 Brooklyn Avenue, Freeport, Long Island, and, on Wednesday, March 27, 1996, was put in the place where outgoing mail was picked up by the mailman. The letter stated:

> Please be advised that Local 32E of the Service Employees International Union has been designated by the employees of the above captioned building to act as their collective bargaining agent, pursuant to the New York State Labor Relations Law.
>
> In view of this designation, we are arranging an appointment for Wednesday April 10, 1996 at 2:30 p.m. in our Bronx office and see Mr. Matthew Persanis, Esq. to discuss the agreement covering wages, hours, working conditions and benefits for such employees.
>
> In the event that this appointment cannot be kept, please do not hesitate to contact this office to arrange a convenient day and time.

Not receiving any response to this letter, the Union filed a petition for an election in Case 2–RC–21674. This was received in the Regional Office on April 3, 1996, at 2:36 p.m.

Between March 22 and April 4, two new employees were hired as porters. These were Charles Allien and Nicholas Michel.

Assuming, as I do, that the mailman picked up the Union's letter on March 27, it would be extremely unlikely that the letter would not have been received before April 4, 1996, when the discharges occurred. Although George Cassis at first testified that he was unsure if he got this letter before or after April 4, and later testified that he received it on April 5, I do not believe him and I conclude that he received the letter on or before April 4. (I view as suspicious the fact that the Respondent, although retaining the original of the letter, claims that it did not retain the envelope which would have shown the date stamp. I also view as suspicious the fact that the original had several things written on it and then crossed out in such a manner that they could not be read.)

On the afternoon of April 4, Shea informed all the employees (except for Cioffi who had gone home early and George's son) that they were discharged. And in this regard, Charles Morrow credibly testified that after Shea said that they were all discharged, he got on the phone with George Cassis, who said that he had gotten a letter from the Union, that he did not want a union, and that they were all terminated.

On April 4, 1996, while Hoy was on vacation in Florida, he received a phone call from Shea. He credibly testified that during the conversation she told him that George Cassis had called her from the Long Island office and told her that the men went to a union and to fire everyone. (Although denying that George Cassis said anything about a union, Shea does concede that on April 4 she was told by him to fire the entire crew.)

Louis Cioffi testified that he left early on April 4 because he did not feel well and did not go to work on April 5 or 6. He testified that when he called Donald Hoy on Sunday, April 7, he was told that they were all fired. Cioffi took Hoy's word for it and did not report back to work. Instead, when the Union put up a picket line, he participated in the picketing on one day. Since it is clear from Shea's testimony that she was directed to discharge all of the workers, I conclude that Cioffi would have been discharged on April 4 had he been present on that day and that the message that he received from Hoy on April 7, simply confirmed that state of affairs. I also note that the Respondent did not communicate

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[6] This argument did not come out of the blue as Hoy admitted that before this time his relationship with George Cassis was "awkward at best."

[7] George Cassis testified that his mother had authority over him in relation to the running of the business.

with Cioffi after April 7 in an effort to have him return to work.

The Respondent argues that Morrow was never terminated and that it is ready to use him as an independent contractor when needed. It has, however, never offered him any more work after April 4. Based on the credited testimony of Morrow, I conclude that he was hired as an employee and that he was discharged with the other employees on April 4.

The Respondent contends that it discharged Moody because of his past poor attendance. Although Moody may have had a poor attendance record, the evidence shows that for a long period of time the Respondent tolerated his absences, apparently because George Cassis felt that Moody offered good performance while at the job. I also note that in during the 3-week period before April 4, Moody had no attendance problems.

Based on the credited evidence, the only conclusion that I can reach in this case is that having received the Union's demand for recognition, the Respondent, as it did in a prior case, responded by discharging the people employed at the Mountainview jobsite. (Retaining only Cassis' son.) This conclusion is based on the timing of the discharges in relation to the receipt of the recognition demand and on the credited testimony of Hoy and Morrow. Although Alien and Michel did not sign cards for the Union (having been only recently hired), this fact is not significant because the evidence shows that George Cassis' object was to remove the entire crew because there was, in his mind, reason to believe that the employees there might choose to be represented by a union.

Notwithstanding this conclusion, I must nevertheless recommend that insofar as the complaint alleges the unlawful discharge of Hoy, this allegation should be dismissed because of his supervisory status. *Parker-Robb Chevrolet*, 262 NLRB 402 (1982).

D. *The 8(a)(5) Allegation*

The evidence here shows that Hoy was a supervisor and that he was the person who solicited and obtained the authorization cards from Cioffi and Moody. As such, these cards and his own, cannot form the basis for showing that the Union represented a majority of the employees. *Sara Neuman Nursing Home*, 270 NLRB 663 (1984). Accordingly, as the General Counsel cannot show that a majority of the employees voluntarily selected the Union as their representative, the refusal to bargain allegation must be dismissed.[8] In this regard, I view as distinguishable the cases cited by the General Counsel in his brief. For example, in *A.P.R.A. Fuel Oil*, 309 NLRB 480, 498–499 (1992), the Board held that the fact that a low level supervisor participated in the union campaign, did not taint cards solicited by others. And in *United Artists Communications*, 280 NLRB 1056, 1058 (1986), the Board stated:

> As the judge notes, supervisory participation in the solicitation of authorization cards, normally "taints" the cards, rendering them unreliable as indicators of employee support for a union. However, we agree with the judge that the normal rule does not apply to the unusual circumstances in this case. At the time, Tola solicited the cards, he was scheduled for discharge, told the employees he was being discharged, and asked the employees not to tell management that he was soliciting cards. . . . He did not make any promises of benefits or threats of reprisals in regard to their employment in the course of his solicitation of the authorization cards. Indeed, three of the employees who signed authorization cards for Local 5A had been strongly advised as recently as 4 months earlier by then-Theater Manager Mancuso *against* signing union cards.
>
> Thus, at the time the employees were solicited by Tola to sign authorization cards for Local 5A in June 1982, they were well aware of the Respondent's strong opposition to unions, and had been threatened with discharge if they joined a union. They were also aware that Tola himself would soon be discharged and would therefore be incapable of either rewarding them for signing a card, or punishing them for not doing so. Under these circumstances, we agree with the judge that the potentially objectionable effects of card solicitation by a supervisor are not present in this case.

CONCLUSIONS OF LAW

1. By discharging Charles W. Morrow, Louis Cioffi, Joe Elias Moody Jr., Charles Allien, and Nicholas Michel, the Respondent violated Section 8(a)(1) and (3) of the Act.
2. By the conduct noted above, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
3. The Respondent has not violated the Act in any other manner alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]

[8] Even if I had concluded that Hoy was not a supervisor, I would nevertheless find that the cards were tainted based on his relationship between management and the employees. See for example *Elias Malluk Realty Corp.*, 265 NLRB 1225 (1982). At the time of the demand for recognition, there were five employees plus Hoy. Of these, Cioffi signed a card directly solicited by Hoy. Moody did not actually sign a card, but asserts that he authorized a union agent to sign a card on his behalf. Morrow signed a card at the Union's office in the presence of Hoy. Allien and Michel did not sign union cards.